IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 212 of 1988

with

CRIMINAL MISC.APPLICATION No 690 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE A.N.DIVECHA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? Yes

2. To be referred to the Reporter or not? No

3. Whether Their Lordships wish to see the fair copy of the judgement? No

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? No

5. Whether it is to be circulated to the Civil Judge? No

KHODABHAI PREMABHAI

Versus

STATE OF GUJARAT

Appearance:

Shri P.B.Bhatt, Advocate, for the appellants -accused (in both the matters).

Shri S.T.Mehta, Additional Public Prosecutor, for the Respondent - State (in both the matters).

CORAM : MR.JUSTICE A.N.DIVECHA

Date of decision: 03/12/96

ORAL JUDGEMENT

The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Kheda at Nadiad on 21st March 1988 in Sessions Case No.111 of 1987 is under challenge in Criminal Appeal No.212 of 1988 at the instance of the original accused under section 374 of the Code of Criminal Procedure, 1973 (the Cr.P.C. for brief). Thereby they have been convicted of the offence punishable under section 325 read with section 114 of the Indian Penal Code, 1860 (the I.P.C. for brief) and sentenced to rigorous imprisonment for six months and fine of Rs.100/= in default rigorous imprisonment for fifteen days for each of them.

2. At the time of preliminary hearing of this appeal, this court appears to have found that the appellants -accused were leniently dealt with by the learned trial Judge. It appears that this court thereupon issued a suo motu notice for enhancement of the sentence and the proceeding arising therefrom has come to be registered as Miscellaneous Criminal Appeal No.690 of 1988. Since the same judgment and order of conviction and sentence is under consideration in both these proceedings, I have thought it fit to dispose of both these matters by this common judgment of mine.

3. The facts giving rise to both these proceedings move in a narrow compass. The incident giving rise to the criminal proceeding against the appellants - accused is stated to have occurred at about 8.00 p.m. on 14th January 1987. It is the case of the prosecution that appellant - accused No.1 was abusing his two nephews in the open street and one Pashabhai Ranchhodbhai (the complainant for convenience) tried to pacify him and tried to persuade him not to use any abusive language. Thereupon, appellants - accused Nos.2 and 3 came out with sticks in their hand and appellant - accused No.3 gave three stick blows to the complainant. At that stage, one Lakhabhai Kalabhai (the deceased for convenience) is stated to have intervened. In order to stave off the assault by appellant - accused No.2 with his lathi on the complainant, the deceased received lathi blows on his right hand resulting in its fracture. It appears that, in the meantime, certain people gathered together and thereupon the appellants - accused went away from the place of the incident. The complainant and the deceased went to the Police Station of Khambhat (Rural) at Khambhat at about 11.00 p.m. and the complaint of the complainant as what is popularly known as N.C.Complaint was recorded at about 11.45 p.m. Both the complainant and the deceased were sent to K.N.Z.Hospital at Khambhat

(the Hospital for convenience) with a police yadi. After giving primary treatment, both were advised admission as indoor patients and the deceased was admitted as an indoor patient on 16th January 1987. It appears that, from the preliminary examination of the deceased by the Medical Officer of the Hospital, it was found that the deceased had suffered a fracture in his right hand. It appears that he was advised operation. One Dr. Goradia performed the operation on 21st January 1987. Unfortunately for the deceased and members of his family, the deceased died after the operation. Thereafter, investigation on the basis of the N.C.Complaint was undertaken in the right earnest. On conclusion of the investigation, a chargesheet was submitted in the court of the Judicial Magistrate (First Class) at Khambhat on 21st May 1987 charging the appellants - accused with the offences punishable under Sections 302, 325, 504 and 114 of the IPC. It came to be registered as Criminal Case No.955 of 1987. Since the offence punishable under Section 302 of the IPC was triable by the Court of Sessions, by his order passed on 23rd June 1987, the learned trial Magistrate committed the case to the Sessions Court of Kheda at Nadiad for trial. It came to be registered as Sessions Case No.111 of 1987. It appears to have been assigned to the learned Additional Sessions Judge for trial and disposal. The charge against the appellants - accused was framed on 7th November 1987 at Exh.3 on the record of the case charging them with the offences punishable under Sections 302, 325, 504 and 114 of the IPC. No appellant - accused pleaded guilty to the charge. They were thereupon tried. After recording the prosecution evidence and after recording the further statement of each accused under Section 313 of the Cr.P.C. and after hearing arguments, by his judgment and order passed on 21st March 1988 in Sessions Case No.111 of 1987, the learned Additional Sessions Judge of Kheda at Nadiad convicted the appellants - accused of the offence punishable under Section 325 read with Section 114 of the IPC and sentenced each of them to rigorous imprisonment for six months and fine of Rs.100/= in default rigorous imprisonment for fifteen days. The appellants - accused were however acquitted of the offences punishable under Sections 302 and 504 of the IPC. That aggrieved the accused. They have therefore invoked the appellate jurisdiction of this court under Section 374 of the Cr.P.C. for questioning the correctness of their conviction and sentence by the learned trial Judge. It appears that, at the time of its preliminary hearing, this court found the appellants - accused to have been leniently dealt with qua the order of sentence. It

appears that this court thereupon suo motu issued the notice of enhancement. Both the proceedings are disposed of by this common judgment of mine.

4. Learned Advocate Shri Bhatt for the appellants has taken me through the entire evidence on record in support of his submission that the learned trial Judge was in error in convicting the appellants - accused of the offence punishable under Section 325 read with Section 114 of the IPC. It has been urged by learned Advocate Shri Bhatt for the appellants- accused that the learned trial Judge ought to have come to the conclusion that the prosecution could not bring the guilt home to the accused or any of them beyond any reasonable doubt. In the alternative, learned Advocate Shri Bhatt for the appellants - accused has submitted that the benefit of probation ought to have been granted to the present appellants. As against this, learned Additional Public Prosecutor Shri Mehta for the respondent - State has urged that the learned trial Judge has carefully examined and appreciated the evidence on record and has found the appellants herein to be guilty of the offence punishable under Section 325 read with Section 114 of the IPC. According to the learned Additional Public Prosecutor Shri Mehta for the respondent - State, the conclusion reached by the learned trial Judge in that regard is borne out by the overwhelming evidence on record and that calls for no interference by this court in this appeal. Learned Additional Public Prosecutor Shri Mehta for the respondent - State has further urged that the learned trial Judge has very leniently dealt with the appellants - accused qua the order of sentence and, looking to the gravity of the offence, the learned trial Judge ought not to have imposed the sentence of rigorous imprisonment for six months only. The sentence of fine is also quite on the lower side according to the learned Additional Public Prosecutor Shri Mehta for the respondent - State. It has been urged on behalf of the respondent - State that this is a case foe enhancement of the sentence and no question of grant of probation to the appellants accused should arise.

5. The learned trial Judge appears to have based his finding of guilt against the appellants - accused on the basis of the ocular account rendered by certain eye witnesses. It would be quite proper to look at the ocular account given by prosecution witness No.6, named, Vardhabhai Zaverbhai, at Exh.36 on the record of the case. In para 6 of his cross-examination, he has clearly stated that appellant - accused No.1 did not beat or hit anyone in the course of the quarrel between the parties.

There is no evidence on record to show or to suggest that appellant - accused No.1 in any manner or way instigated appellants - accused Nos.2 and 3 or either of them to assault the complainant and the deceased. It appears that the learned trial Judge has lost sight of this material part of the evidence in the cross-examination of prosecution witness No.6 at Exh.36 on the record of the case. This evidence on record is sufficient for coming to the conclusion that the prosecution has failed to prove its case at least against appellant - accused No.1 beyond any reasonable doubt. The impugned judgment and order of conviction and sentence qua him cannot therefore be sustained in law.

6. So far as the ocular account is concerned, it is an admitted position on record that the deceased was carried to hospital in his conscious state. Even the medical evidence on record also clearly goes to show that the patient was in a fully conscious state when he was brought to the hospital with a police yadi. It is unfortunate that the complaint given by the complainant was taken down as an N.C.Complaint and no serious note of it was taken. No statement of the deceased came to be recorded in the course of investigation. In fact, as transpiring from the oral testimony of the investigating officer examined as prosecution witness No.13 at Exh.48 on the record of the case, the investigation was undertaken only after the death of the deceased occurring on 21st January 1987. That explains why the police statement of the deceased did not come to be recorded. If it was recorded, it might have been taken on record as his dying declaration. Since it is not there, we will have to look to some other material as to what the deceased stated about the incident.

7. The hospital case papers have been brought on record at Exh.24 at trial. These medical papers consist of three sets of case papers. The first set appears to be when the deceased was examined as an outdoor patient. He appears to have given the history of the incident as assault. The doctor appears to have written down the history of the incident as "assaulted injury". The second set of case papers pertains to his admission as an indoor patient on 16th January 1987. Again, the history of the incident is recorded as "assault by lathi". The third set of case papers appears to be at the time of performance of operation on the deceased by Dr.Goradia on 21st January 1987. Again, the history of the incident is recorded therein as "assault by lathi by someone". The name of the assailant is not given. Even at the cost of repetition, it may be reiterated that both the medical

evidence and the ocular account would clearly go to show that even at that stage the patient was fully conscious. The prosecution has not chosen to explain why the name of the assailant is not mentioned in the history of the incident as recorded in the medical case papers. This would assume importance in view of the fact that his police statement has not come to be recorded.

8. Since the medical evidence is quite clear to the effect that the injuries found on the person of the deceased were not very serious, the dying declaration of the deceased was justifiably not recorded. In that view of the matter, the history of the incident as recorded in the medical case papers will have to be treated as his dying declaration. The absence of the name of the assailant or assailants in the history of the incident recorded in the medical case papers would therefore assume importance. The prosecution has not chosen to explain this omission.

9. It transpires from the medical evidence of Dr. Chudasma examined as prosecution witness No.1 at Exh.20 that he had examined the complainant also with respect to the injury found on his person. It is not the case of the witness at Exh.20 that no medical case papers of the complainant were prepared. The presumption would be otherwise. The medical case papers of the complainant have not been brought on record by or on behalf of the prosecution. It does not become clear whether or not in the medical case papers the complainant gave the names of the assailant or assailants while giving the history of the incident. In that context, the absence of the name of the assailants in the history of the incident as recorded in the medical case papers of the deceased would also assume importance.

10. The defence version is to the effect that the appellants - accused were excommunicated on account of beating of a drum on the occasion of the second marriage of appellant - accused No.2 despite non-granting of the permission by their caste leaders. It is their case that they were trying to be associated with their caste people in the neighbouring area. With a view to preventing them from doing so, a false case is filed against them. Their alternative version at the trial was to the effect that the complainant and his group were the real assailants. That fact is borne out by the filing of one N.C.Complaint by appellant - accused No.1 against the deceased and two other persons. I think the defence version stands probabalised in view of the material on record. With respect, the learned trial Judge appears to have missed

this probabalised version of the defence, more particularly in view of the absence of the name or names of the assailant or assailants in the medical case papers of the deceased coupled with the fact that no medical case papers pertaining to the complainant were brought on record. In that view of the matter, the conviction of appellants - accused Nos.2 and 3 also cannot be sustained.

11. In view of my aforesaid discussion, I am of the opinion that the impugned judgment and order of conviction and sentence passed by the learned trial Judge cannot be sustained in law. It deserves to be quashed and set aside.

12. In the result, this appeal is accepted. The judgment and order of conviction and sentence passed by the learned Additional Sessions Judge of Kheda at Nadiad on 21st March 1988 in Sessions Case No.111 of 1987 is quashed and set aside. The bail bonds furnished by the appellants - accused are ordered to be cancelled. The fine, if paid, is ordered to be refunded. The notice for enhancement is discharged.

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